Supreme Court, U.S.
FILED
FEB 18 2003
OFFICE OF THE CLERK

No. 02-311

IN THE

Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

v.

SEWALL SMITH et al.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENTS

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BEST AVAILABLE COPY

CAPITAL CASE

QUESTION PRESENTED

As allowed by Maryland's death penalty statute, Wiggins waived his right to a jury trial, but not to a jury sentencing. At sentencing, the jury first had to determine, unanimously and beyond a reasonable doubt, whether Wiggins was a first degree principal in the victim's murder. Had it not been persuaded of Wiggins's first degree principalship, the sentencing jury never would have reached the further questions whether aggravating and mitigating circumstances had been proven. Nor would the jury have engaged in the weighing of aggravating and mitigating circumstances to determine whether death was an appropriate sentence. The question presented is:

Where counsel had obtained records and information reflecting that Wiggins, who steadfastly maintained his innocence of all crimes except possession of stolen property, had psychological problems and had been neglected as a child and physically and sexually abused, did the Maryland Court of Appeals not unreasonably apply *Strickland v. Washington* in determining that counsel, in a case comprised entirely of circumstantial evidence, made a deliberate, tactical choice not to present evidence at sentencing that could explain why Wiggins murdered the victim and to present instead a case for why Wiggins was not a first degree principal in the murder?

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STATUTORY PROVISIONS INVOLVED

Maryland's death penalty statute, as in effect when Wiggins was sentenced, Md. Code Ann., Art. 27, § 413 (1987 Repl. Vol. & 1989 Cum. Supp.), is reproduced as an appendix to this brief at App. 1a-8a, together with Maryland Rule 4-343 (1989) at App. 8a-20a, which sets out the jury sentencing form in use at the time of sentencing in Wiggins's case.

PRELIMINARY STATEMENT

Wiggins proceeds in this Court as though he were attacking a state court decision on direct review prior in time to this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). Wiggins's case is a habeas case, subject to the restrictions that Congress placed on the power of federal courts to grant writs of habeas corpus to state prisoners when it enacted the Antiterrorism and Effective Death Penalty Act of 1996. Wiggins's portrait of inexperienced, incompetent trial attorneys who went down a doomed path due to lack of investigation and an inept choice of sentencing tactics is inaccurate. When the actions of Wiggins's attorneys are viewed fairly and with the deference owed them under *Strickland*, and not through the distorted prism of hindsight, a far different picture emerges.

From the outset, Wiggins's trial team of two attorneys, one with eight years of trial experience in over 800 felony cases (including a previous capital case) and the other with four years of experience (including appellate work on death penalty cases), conducted a thorough investigation and designed a comprehensive litigation strategy. Although the evidence was undisputed that Wiggins had been seen talking with the victim on the day of her murder and was in possession of her car and credit cards that same day, the evidence against Wiggins was entirely circumstantial. This being the case, counsel focused on reasonable doubt, following a course of action, for both trial and sentencing, calculated to avoid a first degree murder conviction, to avoid findings that Wiggins was a first degree principal and death eligible, and to avoid a sentence of death.

Counsel did not pursue that strategy blindly. Contrary to Wiggins's repeated assertions, counsel knew, and in fact so stated in response to questioning by Wiggins's counsel during state post conviction proceedings, that Wiggins had been neglected and abused by his mother, subjected to sexual and physical abuse while growing up, and was of limited intelligence. Trial counsel knew that Wiggins's background could be introduced as mitigating evidence at sentencing. Indeed, in a prior capital case, lead counsel had put on just such evidence at a sentencing proceeding that resulted in a death sentence. Trial counsel also knew that such evidence was double-edged, particularly where, as here, Wiggins's background had made him aggressive and hostile–just the kind of person who to a juror's mind would be capable of drowning an elderly woman. Thus, trial counsel made a reasonable tactical decision not to use evidence regarding Wiggins's background at sentencing, choosing instead to pursue a defense consistent with Wiggins's steadfast claim of innocence.

By adhering to a theory of innocence and not injecting abject social history that would entail a concession of guilt, trial counsel could persist in challenging principalship and the existence of the State's aggravator, i.e., that Wiggins committed a murder during the course of a robbery. If just one juror harbored reasonable doubt on either issue, Wiggins would not have been eligible for the death penalty. Furthermore, Wiggins's counsel knew that if the sentencing jury progressed beyond the issue of death eligibility, it would still have to engage in a weighing process because there existed the undisputed mitigating circumstance that Wiggins had no prior convictions for crimes of violence. By maintaining a theory of innocence, and not placing before the jury evidence that could also suggest possible future dangerousness, counsel had a potent residual doubt defense, which often sways a jury to find in favor of a life sentence.

Viewing counsel's performance in the light of *Strickland*, the Maryland Court of Appeals found that Wiggins's trial team

acted competently. The state court found as a fact that counsel knew of Wiggins's unfortunate childhood, but strategically chose not to present evidence of it to the sentencing jury. The state court ruled that counsel satisfied the performance prong as measured by *Strickland v. Washington*. That ruling is not an unreasonable application of *Strickland* and its progeny, and so there is no authority under 28 U.S.C. § 2254(d) to grant federal habeas relief to Wiggins.

STATEMENT OF THE CASE

A. Circumstances Surrounding the Victim's Death

Seventy-six-year-old Florence Lacs was found dead in the bathtub of her apartment at approximately 3:50 p.m. on Saturday, September 17, 1988. Pet. App. 94a-95a; JA 153-60, 206-07. But for underpants and footwear, Mrs. Lacs was fully clothed in the outfit she had worn to a luncheon on Thursday, September 15. JA 72-74, 155-56. The water in the tub in which Mrs. Lacs was found contained an active ingredient of Black Flag Ant and Roach Killer. JA 205.

Mrs. Lacs's apartment, located at the Clark Manor Apartments in Woodlawn, Maryland, showed no signs of forced entry. Br. in Opp App. 3a; JA 141-42, 148. The apartment had been ransacked, e.g., drawers had been removed from their original locations and their contents left in disarray; the mattress of Mrs. Lacs's bed was sitting askew of the box spring and the pillowcases were missing. Pet. App. 95a; Br. in Opp. App. 3a-4a; JA 148-53. Five unidentified fingerprints, and a baseball-type cap that police were unable to tie to Wiggins, were found inside Mrs. Lacs's apartment. JA 117-29, 144, 194-95.[1]

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[1] In October of 2000, at the request of Wiggins's current counsel, Letter (10/4/2000) to Baltimore County Police Chief Terrance B. Sheridan, the five unidentified prints were compared to known prints of four of Geraldine Armstrong's relatives, including two of her brothers, with negative results, Letter (10/23/2000) from Assistant State's Attorney S. Ann Brobst.

On a coffee table in Mrs. Lacs's living room were two TV Guides. JA 146. The September 17 to 23 guide was unopened. JA 150-51. The September 10 to 16 guide had a bookmark inserted at the page displaying programs for September 15, and there were "markings" next to programs on the dates preceding the 15th. JA 146-47.

Wiggins, who was then living in his car, was hired to work at the Clark Manor Apartments on Wednesday, September 14, 1988. JA 93, 253-55. On the 15th, Wiggins worked with Robert and Joseph Weinberg, "touching up" an apartment before new tenants moved in. JA 253-55. Sometime on the 15th, Mrs. Lacs called down from her apartment to Wiggins and Robert Weinberg to inquire whether their truck was blocking her car. JA 256.

Wiggins was released from work on September 15th "[a]bout 4:45 [p.m.] or so." JA 258. Around 5:00 or 5:30, Chianti Thomas saw Wiggins outside Mrs. Lacs's apartment and heard him talking to Mrs. Lacs about sheetrock. Pet. App. 96a; JA 76-81. Approximately twenty minutes after he was released from work, Wiggins sought out Robert Weinberg and told him he had moved some sheetrock, a task that Weinberg had not asked Wiggins to do. JA 258-59.

Wiggins arrived at his girlfriend Geraldine Armstrong's apartment between 7:30 and 7:45 p.m. on the evening of September 15. JA 95. He was driving Mrs. Lacs's car. JA 95. After arguing with Armstrong's brother about use of water to wash up, Wiggins and Armstrong went to a nearby shopping mall, where they bought items for themselves using Mrs. Lacs's charge cards. JA 95-99, 110-14, 184-85, 208-12; Ex 3:197-200.[2] Wiggins told Armstrong that the cards belonged

[2] "Ex" refers to exhibits Respondents filed in federal district court pursuant to Habeas Rule 5; "R" refers to the record before the Court of Appeals of Maryland when that court affirmed the denial of post conviction relief; and "LM" refers to the materials that Wiggins has lodged in this Court.

to an aunt. JA 97. Although Wiggins himself presented the cards at the time of purchase, Armstrong signed the charge slips. JA 184-85.

Wiggins and Armstrong used Mrs. Lacs's charge cards to buy additional items on Friday, September 16th. JA 111-14, 208-12. On Saturday, Wiggins and Armstrong pawned, for between $30 and $50, a diamond ring that Mrs. Lacs customarily kept in her jewelry box. JA 91-92, 106, 197-99. Wiggins was arrested late on Wednesday, September 21, while driving Mrs. Lacs's car. JA 200-02. With Wiggins were Geraldine Armstrong and a small child. JA 201. As he was approached, Wiggins said: "[S]he didn't have anything to do with this." JA 202.[3]

In a written statement after arrest, Wiggins said he had found Mrs. Lacs's car around 1:00 p.m. the previous Friday. JA 179-86. He claimed the car was in the parking lot of a Roy Rogers restaurant with the driver's side window down and the keys in the ignition. JA 179-80. Wiggins further claimed to have found charge cards in a bag and a ring among some trash on the floor. JA 180, 185.

[3] Although arrested at that time and charged with murder, Ms. Armstrong was not indicted for crimes against Mrs. Lacs. Pet. App. 127a. Despite repeated suggestions by Wiggins that the prosecution made a deal with Armstrong for her testimony at Wiggins's trial, the state courts have expressly found the absence of a deal. Pet. App. 127a.

In federal district court, Wiggins contended for the first time that Armstrong made a deal to protect her brothers, one of whom Wiggins says, Pet. Br. 3, 44, lived in an apartment directly below the victim at the time of her murder. Ms. Armstrong never testified that her brother lived below Mrs. Lacs at the time of the murder. At trial Armstrong acknowledged that a brother "had" lived at the Clark Manor Apartments, that Wiggins had stayed with that brother, and that it may have been a year before the murder when Wiggins did so. Ex 3:201-08. At sentencing Armstrong testified that Wiggins lived with her brother at the Clark Manor Apartments during June or July of 1988. JA 93-94.

B. Wiggins's Trial

By indictment filed in the Circuit Court for Baltimore County in October, 1988, Wiggins was charged with murder and other crimes. JA 1. For the murder, the State sought the death penalty. JA 1.

Assistant Public Defenders Carl Schlaich and Michelle Nethercott represented Wiggins at trial and sentencing. JA 471-73, 513-14.[4] Lead counsel Mr. Schlaich was a law clerk at the Office of the Public Defender when he was admitted to the bar in 1981, and afterwards he worked as a panel attorney for that office until hired full time as an administrative assistant to the director of Patuxent Institution, JA 472, an institution within the Maryland Department of Public Safety and Correctional Services that was then charged with rehabilitating, by means other than incarceration, persons under sentence of imprisonment who had intellectual deficiencies or were emotionally unbalanced, Md. Code Ann., Art. 31B, §§ 1-2 (1983 Repl. Vol.). Mr. Schlaich was hired as a full-time public defender in Baltimore County in October of 1984. JA 472. He thereafter handled two hundred or more felony cases a year. JA 499. Before representing Wiggins, Mr. Schlaich had been lead counsel for Al Wayne Doering, also a capital defendant in a Baltimore County case, JA 473-75, and he had represented another defendant whose case "was a potential death qualified

[4] Maryland by statute has a statewide public defender system, the Office of the Public Defender of Maryland (OPD), through which indigent defendants in criminal cases are provided legal representation and other expert resources. Md. Code Ann., Art. 27A, §§ 1-14 (1997 Repl. Vol. & 2002 Supp.). OPD has a "specialized Capital Defense Division that provides support services and legal assistance to both local Public Defenders and panel attorneys." *The Report of The Governor's Commission on the Death Penalty-An Analysis of Capital Punishment in Maryland: 1978 to 1993* at 192 (1993). The cited report makes thirteen findings, the sixth being that "[t]he Maryland Public Defender provides excellent and thorough legal representation to defendants in capital cases. That role is essential to the legitimacy of the death penalty." *Id.*

case," JA 474. Ms. Nethercott joined the bar in 1985, and began working as a public defender in January of 1988. JA 513. Ms. Nethercott had not previously tried a capital case, but had worked on capital appeals in South Carolina doing legal research. JA 513-14.

Ms. Nethercott did "a lot of legal research" in Wiggins's case, JA 515, and she prepared most of the pleadings, with Mr. Schlaich serving as editor, JA 477-78, 515. In one of its many pretrial motions, the defense urged that the State be required to make a prima facie showing of sufficient evidence to support the aggravating circumstance it intended to rely on in seeking the death penalty. JA 8-16. Counsel wanted to circumvent Wiggins's being tried by a death-qualified jury, which they believed would be more prone to convict, should Wiggins not waive a jury for trial. JA 8-16.

Wiggins's motion was denied, JA 16, and he waived his right to a jury trial at the guilt/innocence phase, saying: "My decision is to go with a judge because I have the death penalty over my head, and I feel as though the people that agree to the death penalty are more likely to go with the State, and I feel as though, you know, that's a prejudice in that area." JA 26. In testimony at Wiggins's post conviction hearing, Mr. Schlaich explained that in his experience Baltimore County juries were "extremely conservative" and "very bent towards guilt." JA 500. He believed that Judge J. William Hinkel, the assigned trial judge, would be able to look past the grisly circumstances of the crime and "look at the reasonable doubt question and make a decision, solid, intellectual decision." JA 500.

The evidence adduced at Wiggins's trial, which occurred in early August of 1989, JA 1, was well summarized by the Maryland Court of Appeals on direct review. Br. in Opp. App. 2a-9a. Based on this evidence, Judge Hinkel found Wiggins guilty of murder, robbery, and two counts of theft. JA 28-32. Judge Hinkel concluded that the victim's death "had to occur sometime after the defendant finished work on Thursday [and] the time he appeared with the automobile and credit card at the

home of Geraldine Armstrong." JA 31. As Judge Hinkel concluded his findings, Wiggins interrupted the statement of the verdict, asserting: "He can't tell me I did it. I'm going to go out. . . . I didn't do it. He can't tell me I did it." JA 32.

Immediately after verdict, Mr. Schlaich requested that sentencing be delayed until September or later, saying: "There are many things to do, including the examination of Mr. Wiggins by various experts and notifying the State of those expert opinions as well as concluding various statistical studies." JA 33. The court granted counsel's request as "reasonably necessary." JA 33.

C. Wiggins's Sentencing

Sentencing in Wiggins's case occurred in October of 1989, more than two months after trial concluded. JA 2. In a Supplemental Answer to State's Discovery Request filed on September 18, 1989, the defense advised that it intended to call William Stejskal, Ph.D., as an expert in psychology, and that Dr. Stejskal was of the opinion that Wiggins suffered from a mental disorder and had an I.Q. of 79. R 440-41. The bases for Dr. Stejskal's opinions included clinical interviews of Wiggins, Department of Social Services (DSS) records,[5] transcripts of interviews by Public Defender investigators with family members, and psychological tests. R 440-41.

Among the many defense motions that Judge Hinkel entertained immediately before sentencing, JA 43-52, was one to bifurcate the proceeding, so that the issues of principalship and aggravators would be decided before the jury heard any

[5] Wiggins has lodged with this Court the DSS records that defense counsel obtained pursuant to court order dated February 22, 1989, requiring the Baltimore City Department of Social Services to "honor the Defendant's subpoena and immediately provide" Carl Schlaich and Michele Nethercott "a copy of the entire departmental file regarding allegations of abuse against Kevin Wiggins." LM 1. The records, which consist of more than 200 pages of materials, include DSS documents and caseworker reports, as well as medical and school records. LM 2-219.

evidence relating to mitigation. JA 34-42. In support, Ms. Nethercott argued that in the absence of a bifurcated sentencing proceeding the State would be able to introduce evidence, such as the presentence investigation report (PSI), that was both irrelevant to the issues of principalship and the existence of the aggravating circumstance and prejudicial to Wiggins. JA 44. Ms. Nethercott continued:

> To be very specific about it, Your Honor, in this case I can proffer to the Court that, in a non-bifurcated proceeding, the defense is in a position of coming forward with evidence regarding psychological history on Mr. Wiggins, including aspects of his life history, including a diagnosis of a personality disorder, including diagnosis of some retardation.
>
> The problem, Your Honor, is that all of that evidence which is relevant to mitigation in both a statutory and non-statutory sense is not relevant at all on the issue of principalship. And the danger is, if the jury hears all of this, that they're going to use that evidence in coming to a conclusion with respect to principalship and coming to a conclusion with respect to proof on the aggravating factor.

JA 44-45. Judge Hinkel denied Wiggins's request. Br. in Opp. App. 24a-26a.

Wiggins elected to be sentenced by a jury, and although prospective jurors were told that Wiggins had been found guilty of murdering Mrs. Lacs, extensive voir dire was conducted to ensure that selected jurors would punish Wiggins based only on the law and the evidence presented to them. JA 53-54; Ex 8:12-298. As early as the prosecutor's opening statement, Wiggins made it clear to the jurors that he disputed the State's theory that he had killed Mrs. Lacs. In an outburst reminiscent of that which had occurred during rendition of Judge Hinkel's verdict, Wiggins threatened: "I'm not going to take that because I didn't kill that lady. I am not going to sit there and take that. I didn't kill that lady. I am not going to sit there and take that." JA 56.

Defense counsel, too, in opening statement disputed the notion that the State's evidence would prove principalship. JA 70-71. Counsel also relied on the fact of Wiggins's murder conviction to Wiggins's advantage, saying that, as a consequence, Wiggins "will be punished harshly and immediately." JA 68. And counsel, consistent with what Wiggins would later say in allocution, advised that the jury would hear that life had not been easy for Wiggins. JA 72.

The evidence presented by the State at sentencing to prove Wiggins's guilt and principalship was, for the most part, similar to that introduced at trial. JA 55-408. There were some differences. Br. in Opp. App. 10a-11a. For its part, the defense called Dr. Silvia Camparini, a different expert pathologist than the one they had called at trial, and Dr. Camparini gave an opinion regarding time of death that was at odds with the State's theory that the victim had been killed on Thursday, September 15. JA 271-90.

In addition to Dr. Camparini, the defense called Dr. Robert Johnson, Professor of Justice, Law and Society at American University, JA 306, "as an expert in criminal justice with a speciality in social-psychological adjustment of people serving a life sentence," JA 311. One of the exhibits introduced by the State at sentencing was the PSI prepared by the Division of Parole and Probation. JA 17-24. One section of the PSI dealt with Wiggins's institutional history following his arrest for Mrs. Lacs's murder, revealing, among other things, that Wiggins had been charged with being verbally abusive on two occasions. JA 20. Dr. Johnson acknowledged Wiggins's rule violations, JA 318, saying that Wiggins, who had never before been in jail, had been depressed and very upset when first incarcerated, and that the "initial adjustment was extremely difficult," JA 320. In subsequent conversations with Dr. Johnson, Wiggins had "indicated that he felt that he was gradually learning to bend to the rules of the prison." JA 320. Dr. Johnson opined that Wiggins would adjust decently to prison under a life sentence. JA 319-21.

Before the conclusion of the defense's case at sentencing, Mr. Schlaich revisited the issue of bifurcation, saying:

> Your Honor, what we have is that, because of the Court's ruling denying bifurcation of the sentencing phase of this hearing, and based on our argument that to present evidence of Mr. Wiggins' psychological profile during a non-bifurcated proceeding would prejudice the jury's decision as to whether Mr. Wiggins was the principal in the first degree in this offense, we feel that we are prejudiced in such a way that we are precluded from presenting our last witness, who would be, would have been Dr. William [Stejskal]. And therefore, we would not be offering him to the jury live.

JA 348. Mr. Schlaich then proffered that if called to testify Dr. Stejskal, a psychologist who had seen Wiggins on two occasions and conducted numerous psychological tests, would say that Wiggins "is very childlike"; shows "a lack of intellectual development"; "feels ineffective and overmatched by life"; and "has a full scale IQ of 79." JA 349. Mr. Schlaich continued:

> The doctor would testify that an IQ of 79 impairs a person's function in every aspect of daily life that requires problem solving, that it makes those people poor social judges of other people, that it makes people poor judges of decisionmaking in general, that it makes them anxious and confused in demanding situations but, however, at an IQ level of 79, you are bright enough to know that you do more poorly at problem solving than others do and therefore that makes you emotionally vulnerable to what you expect to be an oncoming attack.
>
> He suffers from no brain damage. The doctor will testify that he scored low on the antisocial scale, that he's not impulse ridden, that he is not narcissistic; however, the defendant, the defendant's tests results indicate that he is the type of person who will occasionally take what he thinks he is entitled to.

Furthermore, Your Honor, the results would indicate that he has difficulty coping, but those difficulties are not due to any presence of a psychotic disorder. He's not self-centered or narcissistic. He's aware of his limits. He's interested in other people. He has some capacity for empathy with other people. He wants to function in the world.

The doctor found him to be void of what he classifies as the malignant fluff, which means he sees no aggressive pattern in his behavior and no acted-out hostility. However, he would note that Mr. Wiggins is full of bluster and likes to mouth off and did, in fact, engage in a session of that with the doctor.

He would furthermore state that he feels that he would adapt to prison. However, he will be a very verbal and loud-mouthed prisoner for some time but not physically aggressive.

He would state that it is his opinion that the defendant currently has a psychiatric/psychological diagnosis of personality disorder NOS, which means not of specific type, and that it has features of borderline paranoid personality.

JA 350-51.

After Mr. Schlaich's proffer, the court confirmed: "And you understand that I'm not barring you from offering that testimony but it's in your judgment from a trial strategy that it would be prejudicial to the defendant because of the denial to bifurcate the proceeding; is that correctly stated?" JA 351. Mr. Schlaich replied: "Exactly, Your Honor. I understand you're not barring it but that's a correct restatement of our position on it, Your Honor." JA 351.

Following this discussion about Dr. Stejskal's not being called to testify, counsel turned to the issue of whether Wiggins would testify. JA 352-55. During questioning of Wiggins concerning his election in this regard, Wiggins, after acknowledging that he had no prior criminal convictions that

could be used against him, JA 353, said:

> But let me just say something. I mean, everybody doing every damn–think I have one right to say one thing. I don't have anything to hide, okay. And I don't care what anybody thinks, all right. I know that I didn't kill, but–can I explain to him why? Okay.

JA 353-54. After speaking with counsel, Wiggins decided not to say anything more to the judge, and he waived his right to testify. JA 354.

The sentencing jury was instructed that, by agreement of the parties, the mitigating circumstance–that the defendant has not previously been found guilty of a crime of violence–existed and had been premarked proven on the jury sentencing form. JA 366-67. The sentencing jury was also instructed that Wiggins had been convicted of murder, JA 362, but that "[t]he defendant's conviction of first degree murder does not establish that he was a principal in the first degree." JA 363. And the jury was admonished that "[a] principal in the first degree is one who actually committed the murder by his own hands"; that "[t]he State has the burden of persuading you beyond a reasonable doubt that the defendant was a principal in the first degree to the murder"; and that "[t]he defendant is not required to persuade you that he was not a principal in the first degree." JA 363.

In closing argument, Mr. Schlaich vigorously disputed Wiggins's principalship, saying:

> The fingerprints left behind in Ms. Lacs' apartments are the killers. That's why they're there, and in particular, the fingerprints that are on that soap box. You see the pictures. You see how things have been moved around. You see in those pictures the cleaning supplies pulled out of the closet, placed on the floor, things stacked on the table. One of the things stacked on the table is the soap box the fingerprints came off of.
>
> Who touched it? Who moved it? The killer did. And that fingerprint is not Kevin's. What do these pieces of

evidence lead you to conclude? That Kevin Wiggins did not murder Ms. Lacs to acquire her property.

This conclusion can be reinforced with some other things you should consider. There is Black Flag in the water. Let's assume that it is there because it was sprayed on Ms. Lacs' body like the State tells you.

In their opening and again in their closing, they pointed out to you how bizarre that was. What reason for that is there? It is sick. They ask you, is there anything that you know from this evidence about Kevin Wiggins that leads you to conclude he is a bizarre person like that? Read that pretrial investigation that the State put into evidence. There is not one thing in there that would lead you to conclude that Kevin Wiggins is this kind of a person.

Second, is there any reason to believe that a twenty-seven year old man with no prior record, not only no prior record of a crime of violence, but no prior record at all, nothing, who tries to work, who tries to keep a place to live, would start his criminal career by murdering an elderly woman for her orangish Chevette and her credit cards? The answer to that is no.

JA 396-97.

Under Maryland law, *Thanos v. State*, 330 Md. 77, 87-90, 622 A.2d 727, 732-33 (1993), the choice to allocute at sentencing was personal to Wiggins. Wiggins elected to exercise that right and in doing so emphatically denied culpability for Mrs. Lacs's murder, saying:

> Ladies and gentlemen of the jury, it has been hard for me to know what to say to you. I don't know how to plead for my life.
>
> I am sorry about what happened to Ms. Lacs and I feel for her and her family. But I did not kill her. I should not have used the things that did not belong to me because I know that was wrong, and I am ready to go to jail for that.
>
> I am so upset right now about what is happening. I

> don't know if they were right about this, my lawyers, wanted me to get up and speak, but I've been going through a lot at the Detention Center, and I'm just really upset.
>
> But I do say this. I did not murder Ms. Lacs. I can't believe that the State wants you to give me the death penalty. And they laugh about it in the courtroom. It makes me feel like my life means nothing.
>
> I am not a troublemaker, and I don't hurt people, and have no convictions. I have tried to keep a job and a place to live, but that has not been easy for me because I haven't finished school. And everywhere I go they ask for a degree in this and a degree in that, and I don't have it. And I had to come out of school because I had to support myself because my mother left me on the doorstep.
>
> I would just like to thank you for listening to me, and I would like to thank Carl Schlaich and Michele Nethercott for respecting me and believing me, and hanging in there with me because I have been given a hard time because I've been going through a lot. Thank you.

JA 407-08.[6]

As required by Maryland law in order to impose a sentence of death, Md. Code Ann., Art. 27, § 413; Md. Rule 4-343; App. 9a, the jury first unanimously found beyond a reasonable doubt that Wiggins was a principal in the first degree to the murder of Mrs. Lacs. JA 408. Only then did the jury go on to find, again unanimously and beyond a reasonable doubt, that Wiggins had

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[6] Wiggins's remarks in allocution fulfilled his counsel's prediction in opening statement that "[y]ou're going to hear that Kevin Wiggins has had a difficult life. It has not been easy for him. But he's worked. He's tried to be a productive citizen, and he's reached the age of 27 with no convictions for prior crimes of violence and no convictions, period." JA 72. Wiggins's comments were consistent with the PSI, which, aside from describing Wiggins's institutional history following arrest, did little more than provide a glimpse, from Wiggins's perspective, of his personal, educational, employment, and health history. JA 17-24.

committed the murder in the course of robbing or attempting to rob the victim. JA 409-10. Per the parties' stipulation and the court's instruction, the statutory mitigating circumstance that Wiggins had not been previously convicted of a crime of violence was deemed proven. JA 367. One or more, but fewer than twelve, jurors found an additional mitigating circumstance, i.e., Wiggins's "background." JA 409. Because at least one mitigating circumstance had been proven, Wiggins's jury was required to engage in a weighing process. Md. Code Ann., Art. 27, § 413(h). The jury sentenced Wiggins to death upon finding that the aggravating circumstance outweighed mitigating circumstances. JA 409-10.

In November, 1991, Maryland's high court affirmed all but Wiggins's theft convictions. Br. in Opp. App. 1a-38a. Two judges dissented from the affirmance of Wiggins's death sentence, finding the evidence sufficient to convict Wiggins of murder, but insufficient to establish that Wiggins was a principal in the first degree in that murder. *Id.* 32a-38a. The dissenting judges "would [have] vacate[d] the death sentence and remand[ed] for the imposition of a life sentence." *Id.* 38a. This Court subsequently denied Wiggins's petition for certiorari. *Wiggins v. Maryland*, 503 U.S. 1007 (1992) (order).

D. Wiggins's State Post Conviction Proceedings

In January, 1993, Wiggins initiated state post conviction proceedings in the Circuit Court for Baltimore County. JA 2. Pursuant to Maryland law, Md. Code Ann., Art. 27, § 645A(f) (1992 Repl. Vol.), Wiggins was represented by counsel. Wiggins raised more than fifty claims, including claims that counsel failed to introduce evidence showing that Wiggins was mentally ill, mentally retarded, homeless, and the victim of a horrible childhood, and that counsel failed to conduct an adequate investigation to develop that evidence. Pet. App. 131a-32a. Wiggins's claims were the subject of a hearing that spanned some five months, with testimony being taken on seven days. JA 2-3, 411-606.

To support his ineffectiveness claim, Wiggins called Hans Selvog, a clinical social worker on the staff of the National Center on Institutions and Alternatives. JA 411-12. Mr. Selvog, who was licensed in Virginia and Washington, D.C., but not in Maryland, had prepared, post-trial, a social history regarding Wiggins. JA 411-18; Cert. App. 163a-198a. In compiling the history, Mr. Selvog had "interview[ed] the defendant, interview[ed] the many family members that we could locate about the defendant's life, reviewed records pertaining to the defendant which included his foster care records, medical records and school records." JA 420. As to records reviewed, Selvog "[p]rimarily relied on the Maryland social service records and some of [Wiggins's] medical records from Baltimore area hospitals." JA 420. It was DSS records, according to Selvog, that provided documentary support for Wiggins's history of physical abuse. JA 464. Wiggins himself was the source of information concerning sexual abuse. JA 453, 461. Selvog did not interview anyone who Wiggins claimed sexually abused him or any of Wiggins's foster parents, and he had no official report from the Department of Social Services or any health care professional documenting claims or incidents of sexual abuse. JA 457-64. According to Selvog, Wiggins's "disorientation to reality" and "his erratic behaviors from being completely dependent and infantile at times to being hostile and aggressive" were consistent with someone who had been physically and sexually abused. JA 445-46. Selvog's report acknowledged that Wiggins hated his biological mother. JA 465.

Wiggins also called attorney Gerald Fisher to support his ineffectiveness claim. JA 543-603. When asked to give his opinion regarding "the minimum requirements for effective representation in capital sentencing," JA 563, Mr. Fisher said that it is incumbent upon counsel to hire an experienced person to "do a comprehensive psycho-social history of your client" by talking to the client and family members and by "going back through all of their social files, juveniles files, criminal records,

whatever other files may exist, subpoenaing those records, collecting them." JA 564.

Lead counsel Carl Schlaich also testified for Wiggins at Wiggins's post conviction hearing. JA 474-513. Before representing Wiggins, Mr. Schlaich had attended a two-day seminar sponsored by the Office of the Public Defender regarding how to conduct a defense in a capital case, and he had gone to other seminars at which topics relevant to death penalty cases were discussed. JA 479-83. At the two-day seminar, "jury selection tactics and mitigation proposals" were two of the subjects covered. JA 480. Mr. Schlaich recalled there having been a presentation by jurors who had served on capital cases, and he "remembered leaving there with the feeling that there was no real answer as to what impressed them and what didn't because everyone had a different opinion. Even people on the same case didn't think that the same thing was important to them." JA 480.

Before representing Mr. Wiggins, Mr. Schlaich had served as lead counsel for Al Wayne Doering, also a capital defendant in a Baltimore County case. JA 475, 501. Regarding the Doering case, Mr. Schlaich testified as follows:

> Q And that case proceeded by jury with both guilt/innocence and sentencing, is that correct?
>
> A No, it was a judge facts and jury sentence.
>
> Q Okay. And in the Doering case isn't it true that you as counsel for the defendant introduced voluminous mitigation evidence with respect to background?
>
> * * *
>
> A Yes.
>
> Q And did that include, as to background of Mr. Doering, a psychiatrist?
>
> A Yes.
>
> Q And a psychologist?
>
> A Yes.
>
> Q And a social worker?
>
> A I can't remember about the social worker. I don't remember.

> Q And Mr. Doering had also killed an elderly person during a burglary, is that correct?
>
> A Yes.
>
> Q There was evidence that Mr. Doering had been sexually abused as a child, is that correct?
>
> A Yes.
>
> Q And physically abused as a child, is that correct?
>
> A Yes.
>
> Q He had been in foster care?
>
> A Yes.
>
> Q And all that information had been presented to the jury in the Doering case, is that correct?
>
> A Yes.
>
> Q And additionally, you had been able to corroborate through records and the testimony of independent witnesses that abuse in the Doering case, is that correct?
>
> A Yes.
>
> Q And what sentence did the Doering jury return?
>
> A Death.

JA 501-03. Coincidentally, the judge at Wiggins's post conviction hearing was the judge at Doering's trial, and he confirmed Schlaich's testimony, saying that Doering "had a horrible childhood. It stunk. He was really messed up in the mind. He was given the death penalty by the jury." JA 473.[7]

Several months before Wiggins's trial, Mr. Schlaich

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[7] Although Doering did not escape the death penalty at the trial level, Mr. Schlaich's efforts at sentencing bore fruit on direct appeal. Notwithstanding that Maryland caselaw at the time was against him, and that this Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994), was years away, Mr. Schlaich sought to have information concerning parole eligibility placed before the jury. The Court of Appeals of Maryland set aside Doering's death sentence on the ground that relevant and competent evidence concerning parole eligibility is admissible at a capital sentencing proceeding. *Doering v. State*, 313 Md. 384, 407-12, 545 A.2d 1281, 1292-95 (1988).

transferred from the Public Defender's Office in Baltimore County to that in adjoining Harford County. JA 476. "Most of the factual development" for Wiggins's case had been done before that move, with Mr. Schlaich working "side by side" with co-counsel Michelle Nethercott, "every day," with the work "pretty evenly split." JA 478. After transferring to Harford County, Mr. Schlaich talked to Ms. Nethercott "just about every day" and met with her "face-to-face" once a week. JA 477. Mr. Schlaich estimated having spent approximately 25 to 30% of his time working on Wiggins's case after the move, and, in the last week before trial, Mr. Schlaich had no work responsibilities other than Wiggins's case. JA 477.

Regarding the defense's approach to mitigation at Wiggins's sentencing proceeding, Mr. Schlaich explained as follows:

> A As I recall, we arranged it so that Michelle Nethercott did most of the mitigation preparation. That is my recollection.
>
> Q And did you give her guidance about what to do?
>
> A Yes.
>
> Q What did you tell her to do?
>
> A Well, basically what we did in mitigation was attempt to retry the factual case and try to convince the jury that the State's case on principal issue was just not there.
>
> Q Right. When did you make that decision?
>
> A I don't recall timewise, but I'm sure it was before the trial on the facts because it had to do with how we made the decision about what to recommend to Mr. Wiggins about jury or judge trial, et cetera.

JA 485-86.[8]

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[8] Wiggins claims that counsel failed to investigate mitigating evidence, and attributes the alleged omission to counsel's each believing that "the other was responsible for developing the case in mitigation." Pet. Br. 33. As support, Wiggins relies on Mr. Schlaich's first answer quoted above, and

When trying Wiggins's case, Mr. Schlaich knew that the Public Defender had had social histories prepared in other capital cases, and he was familiar with and had even used the organization with which Mr. Selvog was associated. JA 488-90. When trying Wiggins's case, Mr. Schlaich also knew of the neglect and abuse that Wiggins had suffered, and in this regard specifically testified as follows during questioning by Wiggins's post conviction counsel:

> Q But you knew that Mr. Wiggins, Kevin Wiggins, had been removed from his natural mother as a result of a finding of neglect and abuse when he was six years old, is that correct?
>
> A I believe that we tracked all of that down.
>
> Q You got the Social Service records?
>
> A That is what I recall.
>
> Q That was in the Social Service records?
>
> A Yes.
>
> Q So you knew that?
>
> A Yes.
>
> Q You also knew that there were reports of sexual abuse at one of his foster homes?
>
> A Yes.
>
> Q Okay. You also knew that he had had his hands burned as a child as a result of his mother's abuse of him?
>
> A Yes.
>
> Q You also knew about homosexual overtures made toward him by his Job Corp supervisor?
>
> A Yes.
>
> Q And you also knew he was borderline mentally

---

cites JA 540 for the proposition that "Nethercott testified that Schlaich had that responsibility." Ms. Nethercott, who otherwise acknowledged that she was aware that use of a defendant's social background could backfire on the defense, JA 540, and whose testimony bolstered Mr. Schlaich's testimony regarding the defense strategy at sentencing, JA 541, actually said: "I really did not have a role in seeking funds or seeking persons to do the expert-." JA 540; *accord* JA 515.

retarded?

A Yes.

Q You knew all –

A At least I knew as it was reported in other people's reports, yes.

Q But you knew it?

A Yes.

JA 490-91.[9]

Mr. Schlaich knew that low intelligence, abusive family background, and sex abuse could be mitigating factors at sentencing, even though he could not name specific cases that set "forth the mitigating standards in a capital case." JA 491-92. He also had experience regarding cross-examination of experts who testify about a defendant's background, which, as explained, "was that once we started opening the door, then the State would start asking about things that could be construed as the person being a danger, as being crazy, as being reasons why the jury shouldn't be particularly merciful." JA 506.

When the prosecutor inquired of Mr. Schlaich whether he also brought "to the trial of the Wiggins case any experience or training regarding the effectiveness of the use of conflicting defenses in front of a jury," Mr. Schlaich responded:

A It is not experience because I don't do that. I try not to, at least. There are I guess two schools of thought on it and one is that you direct your defense at one particular point and you build everything to go after that

[9] Wiggins describes the above-quoted testimony in the following terms: "Schlaich initially claimed that he knew the details of Wiggins' nightmarish upbringing, but quickly backtracked, clarifying that he knew only 'that [information] as it was reported in other people's reports,' *i.e.*, the records of the Department of Social Services in his possession." Pet. Br. 10. Contrary to what Wiggins says, Mr. Schlaich did not backtrack from his assertions regarding what he knew, nor did he identify the DSS records as his source of knowledge. Rather, he simply clarified that the source of his information was what other people had said or what other people had been told.

point. And some defense attorneys I see come in and do a shotgun approach and try a little bit of everything and hope something sticks. I personally try to make a point and start with it and go through the trial with it and finish with it.

Q And did you make an opinion, did you have an opinion as to the tactical wisdom of taking the sentencing to jury and saying he didn't do it but if he did, he had a crummy childhood?

A Well, that is something that we consider in making a choice because we have seen it done. I have seen it done in other cases.

Q And what did you think of that as a tactical position to take?

A It is a difficult position to take. There are things done to try to negate some of the bizzare appearances of that, like having one attorney just do guilt/innocence and one do the sentencing so that they can seem like–try to remove some of that taint of conflicting story there.

But it seems to me if you can get away without doing it, it would be better.

JA 504-05.

Pursuant to Maryland Rule 4-407, Judge Fader filed a statement reflecting his ruling on each ground raised by Wiggins in seeking post conviction relief, and the reasons for the action taken. In his 257-page decision filed in October, 1997, Judge Fader devoted 24 pages to Wiggins's claim that counsel at sentencing had failed to develop and introduce evidence concerning Wiggins's background. Pet. App. 132a-156a. In concluding that counsel had not rendered ineffective assistance as alleged, Judge Fader looked at other cases where counsel's performance had been challenged, including *Burger v. Kemp*, 483 U.S. 776 (1987), and *Strickland v. Washington*, 466 U.S. 668 (1984), Ex 40:249-53, and ruled that

[n]one of the above decisions is on a direct parallel with the facts in this case. To argue differences, is to

argue differences that matter not. This court does not accept Fisher's testimony that it was error not to present information along the lines of the Selvog report. Schlaich made a tactical decision and it was reasonable.

Pet. App. 156a.[10]

In February, 1999, the Maryland Court of Appeals, reviewing Wiggins's ineffectiveness claim de novo, affirmed Judge Fader's decision. Pet. App. 92a-130a. The court said:

> In preparing and presenting appellant's case to the jury at sentencing, trial counsel made a deliberate, tactical decision to concentrate their effort at convincing the jury that appellant was not a principal in the killing of Ms. Lacs, or at least at raising a reasonable doubt in that regard. They were, in effect, striving for "two bites at the apple." Notwithstanding that the jury would be, and was, instructed that appellant had been convicted of the crime, the jury still was required to make its own determination, unanimously and beyond a reasonable doubt, that appellant was the actual killer, and, given the entirely circumstantial nature of the State's evidence and the fact that there was some exculpatory evidence, counsel believed that appellant's best hope of escaping the death penalty was for one or more jurors to entertain a reasonable doubt as to his criminal agency.
>
> Counsel were aware that appellant had a most

[10] At page 34 of his brief, Wiggins says that the state post conviction trial judge specifically found "that Wiggins' counsel did not know of the powerful mitigation evidence contained in the social history submitted during post conviction proceedings, JA 606." As support for this proposition, Wiggins cites oral argument at the close of his post conviction hearing, where Judge Fader indicated that he had no reason to believe that counsel had all the information that Selvog had included in his social history. JA 604-06. On reflection, Judge Fader obviously had second thoughts. In his written decision, Pet. App. 137a, he expressly found that counsel had more information than appeared in the PSI, and he quotes Mr. Schlaich's testimony found at JA 490-91.

> unfortunate childhood. Mr. Schlaich had available to him not only the pre-sentence investigation report prepared by the Division of Parole and Probation, which included some of appellant's social history, but also more detailed social service records that recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care, and borderline retardation. He was aware that the jury could regard that background as a mitigating factor. Indeed, as noted, one or more jurors did find appellant's "background" to be a mitigating factor, although not sufficient to outweigh the aggravating factor that they found. Mr. Schlaich understood that some lawyers use what he regarded as a "shotgun approach," attacking everything and hoping that " something sticks." He was not of that view, however, preferring to concentrate his defense. He did not, therefore, have any detailed background reports prepared, although funds may have been available for that purpose. He expressed some concern that that kind of information might prove counterproductive.

Pet. App. 121a-22a.

The court went on to reject Wiggins's argument, which it characterized as being that "in every capital punishment case, it is mandatory for counsel to prepare and present to the sentencing tribunal any evidence that could be used by the tribunal to find a mitigating circumstance, and certainly any evidence of the defendant's abusive childhood." Pet. App. 123a. The court found that counsel must have leeway to make strategic decisions, and that counsel need not present every conceivable mitigation defense. Pet. App. 124a. Applying these and other principles from *Strickland* and its progeny, the court concluded:

> Counsel made a reasoned choice to proceed with what they thought was their best defense. They knew that there would be at least one mitigating factor–the uncontested fact that appellant had not previously been convicted of a

> violent crime–should the jury not credit their attack on criminal agency. It was not unreasonable for them to choose not to distract from their principal defense with evidence of appellant's unfortunate childhood. As Mr. Schlaich noted, the dysfunctional and abused childhood defense is not always successful; judges and juries have condemned to death defendants with equally tragic childhoods.

Pet. App. 126a.

E. Proceedings on Federal Habeas Review

Following this Court's denial of his petition for certiorari, *Wiggins v. Maryland*, 528 U.S. 832 (1999) (order), Wiggins filed an application for federal habeas relief in August, 1999. JA 3. The application was granted on September 18, 2001, because the district court (Motz, C.J.) found the evidence at trial insufficient to convict Wiggins of murder and found counsel at sentencing constitutionally ineffective for failing to develop a mitigation case. Pet. App. 28a-91a.

On appeal, the United States Court of Appeals for the Fourth Circuit reversed. Pet. App. 1a-26a. Regarding the Maryland court's decision respecting sufficiency of the evidence to support Wiggins's murder conviction, the Fourth Circuit said: "We are of the opinion and decide that the Maryland Court of Appeals' decision was not only at least minimally consistent with the record of facts found by the trial judge and thus was not unreasonable within the meaning of § 2254(d), it was fully supported by the record." Pet. App. 17a.[11]

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[11] Wiggins suggests that Chief Judge Wilkinson, in his concurring opinion, expressed reservations about the sufficiency of the evidence to support Wiggins's murder conviction. Pet. Br. 15 n.5. This is not so. Chief Judge Wilkinson said: "My own view is that petitioner very probably committed the heinous offense for which he stands convicted. But I cannot say with certainty that he did so." Pet. App. 24a. Chief Judge Wilkinson then suggested that any lack of certitude should inform the Governor's decision whether to commute Wiggins's sentence of death, adding: "To confuse the rule of law here with the role of clemency would only do a disservice to both." Pet. App. 24a.

Regarding the district court's disposition of Wiggins's ineffectiveness claim, the Fourth Circuit said in part:

> We think that despite any superficial similarities to the instant case, the district court's reliance on *Williams v. Taylor* [, 529 U.S. 362 (2000),] to find the Maryland Court of Appeals' decision unreasonable was misplaced. First, *Williams* does not establish a *per se* rule that counsel must develop and present an exhaustive social history in order to effectively represent a client in a capital murder case. It merely reaffirms the long settled rule, in the context of a particularly glaring failure of counsel's duty to investigate, that defendants have a constitutional right to provide a factfinder with relevant mitigating evidence. *Williams* does require that counsel have some knowledge about potential avenues of mitigation on behalf of a client in order to make a decision that can be fairly characterized as a reasonable strategic choice. This, however, has always been the rule under *Strickland,* and the particular quantum of knowledge required depends on the facts and circumstances of each particular case. Secondly, even if *Williams* did establish such a *per se* rule, it would not have been "clearly established" within the meaning of § 2254, as the *Williams* case was decided more than a year after the Maryland Court of Appeals' decision here. Finally, despite the district court's contention to the contrary, we are of opinion that Wiggins' counsel made a reasonable strategic decision and neither *Williams,* as it may apply here, nor any of *Strickland*'s other progeny, require a different conclusion.

Pet. App. 19a-20a (citations omitted).

SUMMARY OF ARGUMENT

"Under § 2254(d)'s 'unreasonable application' clause, a

federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied *Strickland* incorrectly." *Woodford v. Visciotti*, 123 S. Ct. 357, 360 (2002) (per curiam). Rather, the habeas petitioner must show that the state court "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Id.* This Wiggins cannot do.

Under *Strickland*, trial counsel's performance is judged on the facts of the particular case, not in categorical terms as Wiggins proposes. Judicial review of counsel's performance is highly deferential; the court must indulge a "strong presumption" in favor of counsel's professional judgment; and distorting effects of hindsight must be eliminated. 466 U.S. at 689-90. Even if the performance prong of *Strickland* is surmounted, the criminal defendant must make a showing of prejudice. In this case, Wiggins can make neither showing.

Wiggins's premise that his attorneys failed to adequately investigate his background is belied by the state court record and state court fact findings. The record demonstrates counsel knew that Wiggins had psychological problems, had been physically abused and neglected as a child, and had been sexually abused. Trial counsel knew the very things present counsel now put forth as the social history they chide trial counsel for failing to uncover.

That trial counsel knew Wiggins's background does not mean they had to present that information to the jury at sentencing. Experienced attorneys may very well approach the same case quite differently "and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 466 U.S. at 693. Here, the tactical decisions relating to Wiggins's guilt/innocence trial and sentencing proceeding were part of a cohesive plan to maximize the defendant's chances of an acquittal at trial and to avoid the death penalty at the sentencing phase. The decision to forgo the presentation of Wiggins's social history was a fully informed one, and was well within the range of reasonable

professional judgment. Indeed, to have presented evidence of Wiggins's miserable childhood would have seriously risked undermining the otherwise consistent theory of innocence the sentencing jury did hear. In effect, counsel would have presented inconsistent defenses: "I did not do this, but please consider if you find that I did, that I had a crummy background or lousy childhood." Ex 38:67. This counsel reasonably chose not to do.

Despite many factual differences, Wiggins relies, almost exclusively, on this Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000). Far more analogous to Wiggins's case are this Court's decisions in *Strickland*, *Visciotti*, and *Burger v. Kemp*, 483 U.S. 776 (1987). Particularly analogous is *Bell v. Cone*, 122 S. Ct. 1843 (2002), where trial counsel made a strategic decision to waive closing argument at sentencing. There, this Court rejected Cone's contention that such a decision is per se violative of *Strickland*. This Court should likewise reject Wiggins's contention that social history evidence must always be presented to the jury at a capital sentencing. Because trial counsel's tactical decision not to present such evidence was reasonable under *Strickland*, it cannot be said that the state court's ruling to that effect was an unreasonable application of the same case.

Although this Court need not reach the issue of prejudice under *Strickland*, Wiggins has not met his burden of showing a reasonable probability that the outcome of his case would have been different had the jury heard about his childhood. Perhaps the jury would have felt sorry for him, assuming it believed the totality of the information contained in the social history report. But it is equally, if not more, likely that this evidence would have worked to Wiggins's detriment. From what the jury actually heard, there was nothing to suggest that Wiggins was capable of the bizarre crime of which a judge had found him guilty. Had evidence of Wiggins's aggressiveness and hostility been known, as it would have been revealed by the social history, the chance that the jury would have had a

reasonable doubt as to his guilt or first degree principalship would have been severely reduced. In a very real sense, the evidence Wiggins now asserts was so mitigating to his case might very well have seemed aggravating in the minds of the jurors. Even if not aggravating, such evidence would have increased the chances that the jury would view Wiggins as a future danger, and it would have eliminated the possibility of the jurors' harboring a lingering doubt about guilt. Thus, Wiggins cannot sustain his burden under *Strickland*.

ARGUMENT

I.

WIGGINS CANNOT PREVAIL IN THIS COURT UNLESS HE ESTABLISHES THAT THE MARYLAND COURT OF APPEALS UNREASONABLY APPLIED *STRICKLAND v. WASHINGTON* IN CONCLUDING THAT SENTENCING COUNSEL'S PERFORMANCE WAS NOT DEFICIENT, AND UNLESS HE ESTABLISHES ACTUAL PREJUDICE.

"[A] federal habeas application can only be granted if it meets the requirements of 28 U.S.C. § 2254(d)." *Woodford v. Visciotti*, 123 S. Ct. 357, 358 (2002) (per curiam). Section 2254(d) is a "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997), "which demands that state court decisions be given the benefit of the doubt," *Visciotti*, 123 S. Ct. at 360. Under § 2254(d), Wiggins cannot prevail in this Court unless he establishes that rejection of his ineffective assistance of counsel claim by the Maryland Court of Appeals "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), as determined by "the holdings . . . of this Court's decisions as of the time of the relevant state-court decision," *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J.). Consequently, it is *Strickland v. Washington*, 466 U.S. 668 (1984), and decisions such as *Burger v. Kemp*, 483 U.S. 776 (1987), and *Darden v. Wainwright*, 477 U.S. 168 (1986), not the many lower federal and state court opinions cited by Wiggins, that are relevant. *Bell v. Cone*, 122 S. Ct. 1843, 1851-52 (2002).[12]

In *Strickland*, 466 U.S. at 671-701, this Court articulated the general standards for assessing actual ineffectiveness claims: "the defendant must show that counsel's representation fell below an objective standard of reasonableness," *id.* at 688, and the defendant must "affirmatively prove prejudice," *id.* at 693. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

This Court in *Strickland* also explained how a reviewing court is to judge performance and prejudice. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. The reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. All circumstances are to be considered. *Id.* at 688. The court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," as "[t]here are countless ways to provide effective assistance in any given case" and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at

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[12] Wiggins asserts that the Fourth Circuit "held that a state court decision would pass muster under 28 U.S.C. § 2254(d)(1) so long as it was 'minimally consistent with the facts and circumstances of the case.'" Pet. Br. 15 (quoting Pet. App. 11a). At no point in its opinion reversing the district court's decision on Wiggins's ineffectiveness claim did the Fourth Circuit say, let alone suggest, that the Maryland court's decision was only minimally consistent with the facts and circumstances of the case. Pet. App. 17a-24a. It is clear from reading the court's opinion as a whole that the proper standards for judging claims of ineffective assistance of counsel in the habeas context were applied. In any event, it is this Court's view of the state court opinion that is determinative.

689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

Respecting the particular duty to investigate, the *Strickland* Court clarified that its general standards "require no special amplification in order to define counsel's duty." *Id.*

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690-91.

Under the appropriate test for prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693.

Because the Maryland Court of Appeals correctly identified the principles of *Strickland* as governing analysis of Wiggins's ineffectiveness claim, Pet. App. 114a-15a, 121a-27a, Wiggins cannot show that the court's decision is contrary to clearly established law as determined by this Court. *Cf. Bell v. Cone*, 122 S. Ct. at 1851-52 (concluding similarly). To prevail,

then, Wiggins must show that "the state court's adjudication of his claim involved an 'unreasonable application' of *Strickland*." *Id.* at 1852. "[H]e must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." *Id.* "Rather it is [Wiggins's] burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Woodford v. Visciotti*, 123 S. Ct. at 360. Wiggins cannot meet this burden, nor can he show actual prejudice.

II.

THE MARYLAND COURT OF APPEALS DID NOT UNREASONABLY APPLY *STRICKLAND v. WASHINGTON* IN CONCLUDING THAT COUNSEL'S PERFORMANCE WAS NOT DEFICIENT.

The Maryland Court of Appeals did not unreasonably apply *Strickland v. Washington* in concluding that counsel's performance was not deficient. Counsel investigated Wiggins's background and that investigation fully satisfied counsel's constitutional obligation. Counsel also made a reasonable tactical decision not to present evidence that could have explained why Wiggins murdered Mrs. Lacs and to present instead a case for why Wiggins was not a first degree principal in the victim's murder.

A. Counsel Investigated Wiggins's Background and that Investigation Fully Satisfied Counsel's Constitutional Obligations.

Well before trial, Wiggins's counsel subpoenaed and obtained all of the records of the Baltimore City Department of Social Services regarding allegations of abuse against Kevin

Wiggins. LM 1-219. The records described the circumstances of neglect–being abandoned by their mother for several days with nothing to eat–that prompted placement of Wiggins and his sisters in foster care. LM 47-50. The records chronicled the circumstances of Wiggins's foster care placements over the years, and tracked his development health-wise, at school, and socially. LM 51-95, 126-36, 140-44, 159-64. The DSS records also contained medical and school records. LM 25-26, 35-43, 96-104, 111-22, 145-47, 167-82, 187-205.[13]

Wiggins's counsel also hired two experts, Dr. William Stejskal and Dr. Robert Johnson, both of whom personally interviewed Wiggins and formed opinions based on their respective fields of expertise. Dr. Stejskal, a psychologist, developed a psychological profile on Wiggins. JA 348-51. Dr. Johnson did a social-psychological assessment of Wiggins's ability to adjust to a life sentence in prison. JA 306-21. The

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[13] Wiggins claims that the Maryland Court of Appeals made "a grievous factual error in suggesting that the social services records revealed to Wiggins' lawyers the squalor and abuse to which Wiggins was subjected as a child," Pet. Br. 35, saying further, *id.* at 36, that, "to the extent the Maryland Court of Appeals' ruling rests on this factual point, it is 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' and cannot be upheld under the applicable standard of review. *See* 28 U.S.C. § 2254(d)(2), (e)(1)."

28 U.S.C. § 2254(e)(1) states that "a determination of a factual issue made by a State court shall be presumed to be correct," and that "[t]he [habeas] applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." In *Sumner v. Mata*, 449 U.S. 539, 547 (1981), this Court made clear that the presumption of correctness under the pre-AEDPA version of § 2254(d), a less deferential standard than current § 2254(e)(1), applied to factual determinations of state appellate courts. Consequently, what is critical in reconstructing the circumstances of counsel's challenged conduct here is that counsel had information that Wiggins had been neglected and physically abused as a child, that he had been sexually abused while in foster care, that he had a personality disorder, and that he had an IQ level that impaired his problem-solving ability but was not brain damaged. That counsel had such information is borne out by the record of the state court proceedings in their entirety.

defense also had the PSI before sentencing. JA 17-24. Most significantly, and whatever the source, be it discussions with Dr. Stejskal, discussions with Wiggins, discussions with family members, transcripts of interviews by Public Defender investigators with family members, or Department of Social Services' records, Mr. Schlaich said, during questioning by Wiggins's post conviction counsel, that he knew that Wiggins was removed from the care of his natural mother due to neglect and abuse; that Wiggins had been sexually abused in one of his foster homes; that Wiggins had been the target of homosexual overtures from a Job Corps supervisor; and that Wiggins was borderline mentally retarded. JA 490-91.

Despite ample opportunity to do so in the course of lengthy state post conviction proceedings, Wiggins has never shown that counsel did not develop the same information that formed the bases for Mr. Selvog's social history of Wiggins. Having elicited the fact of Mr. Schlaich's general knowledge regarding Wiggins's background, including knowledge of physical and sexual abuse, JA 490-91, Wiggins's post conviction counsel did not pursue whether Mr. Schlaich knew the details of Wiggins's background as set forth in Selvog's report. JA 474-98, 508-13. The silence in the record in this regard weighs against Wiggins. As it stands, he has never rebutted the presumption that counsel acted well within the wide range of reasonable professional assistance in investigating Wiggins's background. Given the state of the record, there can be no conclusion but that counsel, at a minimum, conducted a reasonable investigation sufficient to support the decision to pursue the defense that they did without conducting further investigation into Wiggins's background.

B. Counsel Made a Reasonable Tactical Decision Not To Present Evidence of Wiggins's Background and To Pursue Instead a Line of Defense Consistent With Wiggins's Protestations of Innocence.

The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases states, in Guideline 11.8.6A., that "[c]ounsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence." ABA Amicus Br. App. 14. Counsel in Wiggins's case had just such strong strategic reasons to forgo presenting evidence of Wiggins's background.

Under Maryland's death penalty statute, Wiggins could waive his right to a jury trial without waiving his right to a jury sentencing. Md. Code Ann., Art. 27, § 413(b). Only if Wiggins was found guilty at trial of first degree murder would the case proceed to a capital sentencing hearing. *Id.* § 413(a). Furthermore, notwithstanding what the factfinder at trial might have said on the subject, *Baker v. State*, 332 Md. 542, 549 n.1, 632 A.2d 783, 786 n.1 (1993), *cert. denied*, 511 U.S. 1078 (1994), the sentencing jury first had to determine, unanimously and beyond a reasonable doubt, whether Wiggins was a first degree principal in Mrs. Lacs's murder. Md. Rule 4-343(e). Had it not been persuaded of Wiggins's first degree principalship, the sentencing jury would never have reached the further question, which it was required to decide unanimously and beyond a reasonable doubt, whether Wiggins had committed the murder while committing or attempting to commit a robbery. *Id.*; Art. 27, § 413(d)(10). Nor would the jury have had to consider whether any mitigating circumstances had been proven, and it would not have had to weigh aggravating and mitigating circumstances to determine if a sentence of death was appropriate. Md. Rule 4-343(e); Art. 27, § 413(g) & (h).

Reconstruction of the circumstances of counsel's challenged conduct, in the light of the structure of Maryland's capital sentencing scheme, discloses that counsel's strategic decision to pursue the defense that they did at sentencing fell within the wide range of reasonable professional assistance. On the one hand, the State's evidence regarding both principalship and the aggravating circumstance was entirely circumstantial. Also, Wiggins had no prior convictions for a crime of violence, and so had a ready-made mitigating circumstance that was consistent with his claim of innocence and meant that counsel were in a good position to persuade the sentencing jury not to impose a sentence of death.

On the other hand, counsel were well aware that evidence of Wiggins's background would not necessarily persuade a jury to spare Wiggins's life. Armed with similar information in a prior capital case involving the murder of an elderly victim, counsel had not succeeded in persuading the jury that his client, Al Doering, should be given a life sentence. JA 501-03. More importantly, Wiggins's counsel knew, and even said on the record at the time of sentencing, JA 43-52, 348-51, that the information they had could adversely affect the jury's decisions on the issues of principalship and the aggravating circumstance.

The Baltimore City DSS records showed that Wiggins deliberately agitated conflict and crises in his foster homes. LM 126. He fought in school, LM 87, and with his foster siblings, LM 88, and was at times hostile to social workers, LM 90. Wiggins's erratic behavior made it "extremely difficult" for both DSS and any foster parent "to plan appropriately for him." LM 83. Wiggins left the foster home where he had lived for ten years after having problems with his foster mother, who often entered the bathroom while he was bathing. LM 72. Wiggins later returned to this foster home after arguing with a different foster mother about cleaning the bathroom; Wiggins did not believe it was his responsibility. LM 83. Wiggins was fired from a job due to his "uncontrollable temper and behavior." LM 89. He was once arrested after stealing a

flammable liquid and food, and attempting to set a fire to a carry-out shop. LM 93. This information, which painted a picture of a man who had violent tendencies, not only was harmful to the defense of innocence, but it easily could have suggested future dangerousness, and it had the potential to undermine the very powerful mitigating circumstance of lingering doubt.

Counsel's handling of Wiggins's case under the circumstances clearly fell within the wide range of reasonable professional assistance. Close inspection of counsel's performance shows them following a consistent course of action throughout trial and sentencing that was designed to take advantage of the weaknesses in the State's case and to minimize the chances that the death penalty would be imposed. This can be seen in five discrete actions taken by counsel.

First, before trial, counsel attempted to circumvent the sentencing phase completely by asking the court to require the State to make a prima facie showing regarding the aggravating circumstance it alleged, i.e., that the murder occurred in the course of a robbery or attempted robbery. The vagaries of the State's evidence regarding time of death made this tactical decision reasonable.

Second, for purposes of trial, counsel advised Wiggins to waive a jury. Counsel were concerned that a death-qualified jury would be more prone to convict, and they hoped that Judge Hinkel would look beyond the circumstances of the crime and make an intellectual decision based on reasonable doubt. Inconsistencies in the evidence relevant to time of death made this tactical move reasonable, as did other weaknesses in the State's case.

Third, before sentencing, counsel tried to persuade Judge Hinkel to bifurcate the sentencing proceedings so that the jury would decide the issue of principalship without hearing about Wiggins's psychological problems and background. Before the defense closed its case at sentencing, counsel renewed their motion to bifurcate. Given that information about Wiggins's

background had the potential to paint a portrait of a man prone to violence, counsel's efforts to have the issue of principalship decided in advance of the defense's case in mitigation were clearly reasonable.

Fourth, at sentencing itself, counsel defended on the ground that the State's evidence failed to show that Wiggins was a principal in the first degree in the murder and on the ground that the State could not establish that Wiggins came into possession of the victim's property by robbing and killing her. Counsel at sentencing had the advantage of a proven statutory mitigating circumstance that was consistent with Wiggins's claim of innocence. Thus, the jury would have to engage in the weighing of aggravating and mitigating circumstances if it progressed beyond the point of finding that Wiggins was a first degree principal in the victim's murder and that the murder occurred during the commission of a robbery or attempted robbery. The evidence relating to time of death and the other weaknesses in the State's case made this a reasonable tactical decision, as did the fact that it was Wiggins, who steadfastly maintained his innocence, who had the ultimate say as to whether he would allocute at sentencing and what he would say during that allocution.[14]

Fifth, by proceeding as they did, counsel had the benefit of a lingering-doubt defense. "'[R]esidual doubt has been recognized as an extremely effective argument for defendants

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[14] In arguing now, Pet. Br. 19, 41-44, 49, that trial counsel "could have had it both ways"–that counsel could have used Wiggins's social history to show that Wiggins's role in Mrs. Lacs's murder was that of an accomplice to or pawn of others–Wiggins ignores that at trial and sentencing he consistently maintained his innocence. As specific support for the argument that trial counsel at sentencing acted unreasonably in not attempting to have it "both ways," Pet. Br. 41, Wiggins cites Judge Niemeyer's concurring opinion at Pet. App. 24a-26a. In so doing, Wiggins ignores that Judge Niemeyer ultimately said: "But in the end, this may be only a luxury of hindsight. There is support in the record from which to conclude that Wiggins' counsel's decision was a tactical one and that it was not an unreasonable strategy to pursue." Pet. App. 25a-26a.

in capital cases,'" particularly where the jury that decides guilt/innocence determines sentence. *Lockhart v. McCree*, 476 U.S. 162, 181 (1986) (citation omitted). And although Wiggins suggests that the defense of lingering doubt was unavailable in his case because the jury that decided his sentence did not decide guilt/innocence, Pet. Br. 45, he is wrong. The sentencing jury had to decide, before anything else, the issue of principalship, i.e., whether Wiggins was personally responsible for murdering Mrs. Lacs. Consequently, residual doubt was very much an available defense in Wiggins's case. Significantly, since this Court's decision in *Lockhart v. McCree*, a number of studies have consistently shown that residual doubt is by far the most compelling circumstance that jurors look to in deciding not to impose a sentence of death. *See, e.g.*, Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N.Ill.U.L.Rev. 41, 56-60 (2001); William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476, 1529 (1998); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1, 28 (1988).

On the issue of strategy pursued, then, Wiggins has not shown that counsel failed to make all significant decisions in the exercise of reasonable professional judgment. More importantly, contrary to Wiggins's claim that counsel's strategy had no chance of prevailing because the jurors were instructed that they were bound by Wiggins's conviction of first degree murder, Pet. Br. 44-45, three state appellate judges' views defeat this position. On direct appeal, although all seven judges found the evidence sufficient to support Wiggins's murder conviction, two judges found the evidence insufficient

on the issue of first degree principalship. Br. in Opp. App. 32a-38a. Likewise, on collateral review, two state appellate judges (one of whom had dissented on direct appeal) would have granted Wiggins relief on the ground that the State's evidence did not establish that Wiggins personally killed Mrs. Lacs. Pet. App. 128a-30a.

Most importantly, Wiggins has not rebutted the presumption that counsel acted within the wide range of reasonable professional assistance by not presenting evidence of Wiggins's background and by pursuing instead a line of defense consistent with his protestations of innocence. Consequently, Wiggins cannot prevail in this Court.

C. When Viewed in the Light of This Court's Recent Decisions, There Can Be No Doubt that the Maryland Court of Appeals' Decision Was Not an Unreasonable Application of *Strickland*.

There can be no disputing that this Court's decision of *Williams v. Taylor* is critical to Wiggins's argument that counsel's performance was deficient. But, to borrow Wiggins's own words, "*Williams* broke no new ground." Pet. Br. 24. *Williams* stands as nothing more than an example of when the failure to investigate and present mitigating evidence, in the absence of a reasonable basis for that omission, rises to the level of a violation of the Sixth Amendment right to effective assistance of counsel.

No matter how hard Wiggins tries, he cannot escape the fact that the circumstances of his case are markedly distinguishable in at least six ways from those in *Williams*. In *Williams*, the defendant had confessed to the robbery and murder for which he received the death penalty. 529 U.S. at 367-68. Wiggins steadfastly maintained his innocence and the prosecution's case was entirely circumstantial. Williams had a prior record for crimes of violence. *Id.* at 368. Wiggins had no prior criminal record. In *Williams*, the prosecution's experts testified that Williams posed "a serious continuing threat to

society," *id.* at 369, yet these same experts would have testified "that Williams, if kept in a 'structured environment,' would not pose a future danger to society," *id.* at 371; however, counsel did not elicit this testimony nor did counsel call correctional officers who would have testified that Williams was unlikely "to act in a violent, dangerous or provocative way," *id.* at 396. Defense counsel in Wiggins's case called an expert who testified that persons serving life sentences tend to be "model prisoners," JA 311, and that Wiggins fit the general profile of a lifer, JA 319. Williams's trial lawyers failed to conduct an investigation into his background because they incorrectly thought state law barred access to such records. 529 U.S. at 373. Wiggins's attorneys obtained social service and other records, and uncovered evidence of Wiggins's nightmarish childhood, but chose as a matter of strategy not to present such. Williams's counsel failed to call a certified public accountant as a character witness out of neglect rather than as a matter of trial strategy. *Id.* at 396. There is no evidence in Wiggins's case that counsel failed to call witnesses out of neglect. Finally, defense counsel's closing in *Williams* focused on how Williams had shown no mercy to his victims and probably did not deserve mercy himself. *Id.* at 369 & n.2. Closing argument in Wiggins's case stressed his innocence and residual doubt as to his role as first degree principal in the crime.

Instead of *Williams v. Taylor*, it is *Strickland v. Washington* and cases such as *Burger v. Kemp* and *Bell v. Cone* that involve circumstances most like those in Wiggins's case. It is the decisions in those cases that show that the Maryland Court of Appeals did not unreasonably apply *Strickland* in concluding that counsel's performance was not deficient. In *Strickland*, petitioner pleaded guilty against counsel's advice; during the plea colloquy petitioner told the trial judge that he had no significant prior criminal record and that he had been under extreme stress at the time of the crimes. 466 U.S. at 672. In preparing for sentencing, counsel spoke to petitioner about his background. *Id.* For purposes of sentencing, counsel relied

on the information communicated during the plea colloquy, thereby ensuring that contrary character and psychological evidence and petitioner's criminal history were not introduced. *Id.* at 673, 699. In applying the general principles announced in *Strickland* to the facts before it, this Court, "even without application of the presumption of adequate performance," *id.* at 699, found that trial counsel's defense, including his "decision not to seek more character or psychological evidence than was already in hand," "was the result of reasonable professional judgment," *id.*

In *Burger*, counsel was aware of some, but not all, of his client's background prior to trial. 483 U.S. at 790. Acknowledging that counsel "could well have made a more thorough investigation than he did," *id.* at 794, this Court said:

> Nevertheless, in considering claims of ineffective assistance of counsel, "[w]e address not what is prudent or appropriate, but only what is constitutionally compelled." *United States v. Cronic,* 466 U.S. 648, 665 n.38 (1984). We have decided that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland,* 466 U.S. at 690-691. Applying this standard, we agree with the courts below that counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment. It appears that he did interview all potential witnesses who had been called to his attention and that there was a reasonable basis for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty. Having made this judgment, he reasonably determined that he need not undertake further investigation to locate witnesses who would make statements about Burger's past.

483 U.S. at 794-95.

Most recently, in *Bell v. Cone*, 122 S. Ct. at 1847-54, where counsel in a capital case did far less at sentencing than did counsel in Wiggins's case, this Court concluded that petitioner could not show that the Tennessee Court of Appeals had applied *Strickland* in an objectively unreasonable manner. *Id.* at 1852-54. Regarding counsel's having relied on evidence introduced at trial to establish mitigating circumstances at sentencing, this Court concluded that Cone's counsel reasonably could have concluded that the testimony of trial witnesses was still fresh in the jurors' minds. *Id.* at 1853. Regarding counsel's not calling petitioner and other witnesses, this Court noted that Cone's counsel circumvented introduction of evidence about petitioner's criminal history and avoided the possibility that petitioner during cross-examination would lash out at the prosecutor and alienate the jury. *Id.* Regarding counsel's waiver of closing argument, this Court recognized that Cone's attorney deprived the lead prosecutor, "who all agreed was very persuasive," of the chance to depict petitioner "as a heartless killer just before the jurors began deliberation." *Id.* at 1854. This Court then concluded its opinion in *Cone*, as did the Maryland Court of Appeals in Wiggins's case, Pet. App. 126a-27a, by referring back to *Strickland*. For its part, this Court said:

> We cautioned in *Strickland* that a court must indulge a "strong presumption" that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight. Given the choices available to respondent's counsel and the reasons we have identified, we cannot say that the state court's application of *Strickland*'s attorney-performance standard was objectively unreasonable.

122 S. Ct. at 1854 (citation omitted).

Viewed in the light of these other decisions, it is Wiggins's position that counsel performed deficiently, not the decision of the Maryland Court of Appeals concluding otherwise, that is an

unreasonable application of *Strickland*. By pressing the position that he does, Wiggins asks this Court to rule that it is deficient performance as a matter of law not to develop and present a social history along the lines of that produced by Hans Selvog. *Strickland*'s general principles and its holding that counsel's performance in that case was not deficient defeat Wiggins's position, as do the holdings of *Burger v. Kemp* and *Bell v. Cone*. *See also Darden v. Wainwright*, 477 U.S. 168, 184-87 (1986) (rejecting claim that counsel did not delve sufficiently into petitioner's background and so were unprepared to present mitigating evidence at sentencing).

If Wiggins's position is accepted, criminal defense attorneys in capital cases will be forced to present evidence like that developed by Mr. Selvog in every instance. Thus strait-jacketed, attorneys in capital cases would lack "the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 689. "Counsel's performance and even willingness to serve could be adversely affected." *Id.* at 690. "[R]igid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Id.*

As this Court stated in *Strickland*: "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-89. Even the ABA Guideline quoted previously does not require that every case be conducted in the same way. As this Court recognized in *Strickland*, "[t]here are countless ways to provide effective assistance in any given case" and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." 466 U.S. at 689. In Wiggins's case, it was reasonable for counsel to defend Wiggins as they did. More significantly, the decision of the Court of Appeals of Maryland finding that counsel did not perform deficiently was not an

unreasonable application of this Court's caselaw.

III.

WIGGINS CANNOT ESTABLISH THAT COUNSEL'S PERFORMANCE WAS PREJUDICIAL.

Rounding out his argument, Wiggins contends, as he must to prevail under *Strickland* and its progeny, that there is a reasonable probability that, but for counsel's performance, the result of his sentencing proceeding would have been different. Pet. Br. 45-50. Because Wiggins did not persuade the state courts that counsel's performance was outside the wide range of reasonable professional judgment, those courts did not resolve the issue of prejudice. This is not to say that Wiggins can show that counsel's performance had the necessary adverse effect on his sentencing proceeding. He cannot.

Williams v. Taylor teaches that in assessing prejudice in a case where counsel is attacked for not presenting mitigating evidence at sentencing, the reviewing court must "evaluate the totality of available mitigation evidence–both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." 529 U.S. at 397-98. Performing this analysis in Wiggins's case does not demonstrate a reasonable probability that the result of Wiggins's sentencing proceeding would have been different had the evidence adduced in state post conviction proceedings, i.e, the Selvog social history, been presented for the sentencing jury's consideration.

Had the Selvog social history been introduced at sentencing, it would have been subjected to the full adversarial process. Mr. Selvog would have been vigorously cross-examined, and his own biases, as well as flaws in both his method of developing information and the information itself, would have been revealed. The jurors would have heard that Selvog's sole source of information about sexual abuse was

Wiggins. JA 453, 461. The jury would have heard that, notwithstanding his obligation under Maryland law to do so, Selvog did not report the sexual abuse to law enforcement authorities. JA 451-53. The jury would have heard that Selvog was asked to chronicle only Wiggins's early years, not his years beyond adolescence. JA 458. The jury would have heard that Selvog did not include information from one of Wiggins's siblings in his report. JA 455.

Had the Selvog social history been introduced at sentencing, the State, in addition to being able to cross-examine Selvog, would have been in a position to give its own interpretation to the information contained in the report and to counter Selvog's report with evidence of its own. As lead counsel for Wiggins said during his testimony at Wiggins's post conviction hearing: "[O]nce we started opening the door, then the State would start asking about things that could be construed as the person being a danger, as being crazy, as being reasons why the jury shouldn't be particularly merciful." JA 506. *Accord Bell v. Cone*, 122 S. Ct. at 1853 (acknowledging that calling witnesses from petitioner's childhood days or days in the Army could have opened the door at sentencing to testimony about petitioner's criminal history); *Burger v. Kemp*, 483 U.S. at 789-95 (recognizing that information not presented at sentencing, in addition to not being uniformly helpful, had the potential to bring damaging facts to the sentencing jury's attention); *Darden v. Wainwright*, 477 U.S. at 186-87 (noting that prosecution could have responded to evidence not introduced at sentencing with evidence of petitioner's prior convictions and a psychiatric report indicating that petitioner could very well have committed the crime); *Strickland v. Washington*, 466 U.S. at 699 (acknowledging that presenting evidence that counsel was faulted for not introducing at sentencing would have opened the door to damaging rebuttal evidence).

Considered in the context of Wiggins's case, the Selvog social history had the potential to strengthen the prosecution's

case at sentencing. The report showed that Wiggins was hostile and aggressive, that he had problems distinguishing fantasy from reality, and that he hated his biological mother. JA 465. To a juror's mind, the information in the Selvog report could have added weight to the prosecution's evidence, by explaining why Wiggins would drown an elderly lady, and leave her in a bathtub filled with insecticide with her skirt hiked to her waist and without any underwear on, for the sole purpose of taking the victim's old car, a ring worth $30 to $50 when pawned, and a few store credit cards. Strengthening the State's case in these regards was the last thing defense counsel wanted. They needed only to persuade one juror that Wiggins was not a first degree principal in Mrs. Lacs's murder to avoid the death penalty. Persuading one juror that the aggravating circumstance had not been proven beyond a reasonable doubt also meant a life sentence for Wiggins.

In addition to strengthening the State's case for why Wiggins was death eligible and why death was the appropriate penalty for the victim's murder, the Selvog social history had the potential to weaken Wiggins's case in mitigation. The Selvog social history, with its evidence of abuse, while perhaps diminishing Wiggins's blameworthiness for a crime he claimed he did not commit, could just as well have indicated that there was a probability that Wiggins would be dangerous in the future. *Penry v. Lynaugh*, 492 U.S. 302, 324 (1989). The history was powerful evidence that Wiggins had hostile and aggressive tendencies. JA 446. Obviously, the defense wanted to avoid any suggestion of future dangerousness. Rather than offer the jury the opportunity to contemplate such matters, counsel instead looked to Dr. Johnson to say that Wiggins would adjust decently to prison were he given a life sentence. Furthermore, had the defense offered the Selvog social history, and the State countered with evidence of its own, the juror or jurors who found Wiggins's background to be a mitigating circumstance might well have been persuaded otherwise by the more comprehensive picture.

Just as it would have strengthened the State's case for why Wiggins was death eligible and deserving of the death penalty, and just as it would have diminished other aspects of the defense's case in mitigation, the Selvog report would have eviscerated lingering doubt, and left the jury with even less in the balance for Wiggins when it came to weighing aggravating and mitigating circumstances. In short, when the Selvog social history is considered along with the mitigating evidence actually adduced at sentencing, Wiggins cannot sustain his burden to show that there is a reasonable probability that but for counsel's performance he would not have been sentenced to death. For this reason, too, Wiggins is not entitled to habeas relief under 28 U.S.C. § 2254(d).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the judgment of the United States Court of Appeals for the Fourth Circuit be affirmed.

Respectfully submitted,

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February 18, 2003

APPENDIX

MD. CODE ANN., ARTICLE 27, § 413 (1987 Repl. Vol. & 1989 Cum. Supp.). SENTENCING PROCEDURE UPON FINDING OF GUILTY OF FIRST DEGREE MURDER.

(a) *Separate sentencing proceeding required.* — If a person is found guilty of murder in the first degree, and if the State had given the notice required under § 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed to determine whether he shall be sentenced to death.

(b) *Before whom proceeding conducted.* — This proceeding shall be conducted:

(1) Before the jury that determined the defendant's guilt; or

(2) Before a jury impaneled for the purpose of the proceeding if:

(i) The defendant was convicted upon a plea of guilty;

(ii) The defendant was convicted after a trial before the court sitting without a jury;

(iii) The jury that determined the defendant's guilt has been discharged by the court for good cause; or

(iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; or

(3) Before the court alone, if a jury sentencing proceeding is waived by the defendant.

(c) *Evidence; argument; instructions.* — (1) The following type of evidence is admissible in this proceeding:

(i) Evidence relating to any mitigating circumstance listed in subsection (g) of this section;

(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of this section of which the State had notified the defendant pursuant to § 412 (b) of this article;

(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior

convictions or pleas, to the same extent admissible in other sentencing procedures;

(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and

(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements.

(2) The State and the defendant or his counsel may present argument for or against the sentence of death.

(3) After presentation of the evidence in a proceeding before a jury, in addition to any other appropriate instructions permitted by law, the court shall instruct the jury as to the findings it must make in order to determine whether the sentence shall be death, imprisonment for life without the possibility of parole, or imprisonment for life, and the burden of proof applicable to these findings in accordance with subsection (f) or subsection (h) of this section.

(d) *Consideration of aggravating circumstances.* — In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.

(2) The defendant committed the murder at a time when he was confined in any correctional institution.

(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

(4) The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

(5) The victim was a child abducted in violation of § 2 of this article.

(6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.

(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit a robbery, arson, rape or sexual offense in the first degree.

(e) *Definitions.* — As used in this section, the following terms have the meanings indicated unless a contrary meaning is clearly intended from the context in which the term appears:

(1) The terms "defendant" and "person", except as those terms appear in subsection (d) (7) of this section, include only a principal in the first degree.

(2) The term "correctional institution" includes any institution for the detention or confinement of persons charged with or convicted of a crime, including Patuxent Institution, any institution for the detention or confinement of juveniles charged with or adjudicated as being delinquent, and any hospital in which the person was confined pursuant to an order of a court exercising criminal jurisdiction.

(3) (i) The term "law enforcement officer" has the meaning given in § 727 of Article 27.

(ii) The term "law enforcement officer", as used in subsection (d) of this section, includes:

1. An officer serving in a probationary status;
2. A parole and probation officer;
3. A law enforcement officer of a jurisdiction outside of Maryland; and

4. If the law enforcement officer is wearing the uniform worn by the law enforcement officer while acting in an official capacity or is prominently displaying his official badge or other insignia of office, a law enforcement officer privately employed as a security officer or special policeman under the provisions of Article 41, §§ 4-901 through 4-913 of the Code.

(4) "Imprisonment for life without the possibility of parole" means imprisonment for the natural life of an inmate under the custody of a correctional institution, including the Patuxent Institution.

(f) *Finding that no aggravating circumstances exist.* — If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and a sentence of death may not be imposed.

(g) *Consideration of mitigating circumstances.* — If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:

(1) The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provocation of another person, but not so

substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

(h) *Weighing mitigating and aggravating circumstances.* — (1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, a sentence of death may not be imposed.

(i) *Determination to be written and unanimous.* — The determination of the court or jury shall be in writing, and, if a jury, shall be unanimous and shall be signed by the foreman.

(j) *Statements required in determination.* — The determination of the court or jury shall state, specifically:

(1) Which, if any, aggravating circumstances it finds to exist;

(2) Which, if any, mitigating circumstances it finds to

exist;

(3) Whether any mitigating circumstances found under subsection (g) of this section outweigh the aggravating circumstances found under subsection (d) of this section;

(4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances under subsection (g); and

(5) The sentence, determined in accordance with subsection (f) or (h).

(k) *Imposition of sentence.* — (1) If the jury determines that a sentence of death shall be imposed under the provisions of this section, then the court shall impose a sentence of death.

(2) If the jury, within a reasonable time, is not able to agree as to whether a sentence of death shall be imposed, the court may not impose a sentence of death.

(3) If the sentencing proceeding is conducted before a court without a jury, the court shall determine whether a sentence of death shall be imposed under the provisions of this section.

(4) If the court or jury determines that a sentence of death may not be imposed, and the State did not give the notice required under § 412 (b) of this article of intention to seek a sentence of life imprisonment without the possibility of parole, the court shall impose a sentence of life imprisonment.

(5) If the State gives the notice required under § 412 (b) of this article of intention to seek a sentence of imprisonment for life without the possibility of parole but does not give notice of intention to seek the death penalty, the court shall conduct a separate sentencing proceeding as soon as practicable after the trial has been completed to determine whether to impose a sentence of imprisonment for life or imprisonment for life without the possibility of parole.

(6) If the State gives the notice required under § 412 (b) of this article of intention to seek the death penalty in addition to the notice of intention to seek a sentence of

imprisonment for life without the possibility of parole, and the court or jury determines that a sentence of death may not be imposed under the provisions of this section, that court or jury shall determine whether to impose a sentence of imprisonment for life or imprisonment for life without the possibility of parole.

(7) (i) In determining whether to impose a sentence of imprisonment for life without the possibility of parole, a jury shall agree unanimously on the imposition of a sentence of imprisonment for life without the possibility of parole.

(ii) If the jury agrees unanimously to impose a sentence of imprisonment for life without the possibility of parole, the court shall impose a sentence of imprisonment for life without the possibility of parole.

(iii) If the jury, within a reasonable time, is not able to agree unanimously on the imposition of a sentence of imprisonment for life without the possibility of parole, the court shall dismiss the jury and impose a sentence of imprisonment for life.

(8) If the State gives the notice required under § 412 of this article of the State's intention to seek a sentence of imprisonment for life without the possibility of parole, the court shall conduct a separate sentencing proceeding as soon as practicable after the trial has been completed to determine whether to impose a sentence of imprisonment for life or imprisonment for life without the possibility of parole.

(l) *Rules of procedure.* — The Court of Appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, including any forms to be used by the court or jury in making its written findings and determinations of sentence.

(m) *Alternate jurors.* — (1) A judge shall appoint at least 2 alternate jurors when impaneling a jury for any proceeding:

(i) In which the defendant is being tried for a crime for which the death penalty may be imposed; or

(ii) Which is held under the provisions of this section.

(2) The alternate jurors shall be retained during the length of the proceedings under such restrictions and regulations as the judge may impose.

(3)(i) If any juror dies, becomes incapacitated, or disqualified, or is discharged for any other reason before the jury begins its deliberations on sentencing, an alternate juror becomes a juror in the order in which selected, and serves in all respects as those selected on the regular trial panel.

(ii) An alternate juror may not replace a juror who is discharged during the actual deliberations of the jury on the guilt or innocence of the defendant, or on the issue of sentencing.

[Maryland's death penalty statute is now codified at Sections 2-202 and 2-303 of the Criminal Law Article of the Maryland Annotated Code.]

MARYLAND RULE 4-343 (1989). SENTENCING — PROCEDURE IN CAPITAL CASES.

(a) Applicability. — This Rule applies whenever a sentence of death is sought under Code, Article 27, § 413.

(b) Statutory Sentencing Procedure. — When a defendant has been found guilty of murder in the first degree, the State has given the notice required under Code, Article 27, § 412(b) (1), and the defendant may be subject to a sentence of death, a separate sentencing proceeding shall be conducted as soon as practicable after the trial pursuant to the provisions of Code, Article 27, § 413.

(c) Judge. — Except as provided in Rule 4-361, the judge who presides at trial shall preside at the sentencing proceeding.

(d) Allocution. — Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement.

(e) Form of Written Findings and Determinations. — Except as otherwise provided in section (f) of this Rule, the findings and determinations shall be made in writing in the following form:

(CAPTION)

FINDINGS AND SENTENCING DETERMINATION

Section I

Based upon the evidence, we unanimously find that each of the following statements marked "proven" has been proven BEYOND A REASONABLE DOUBT and that each of those statements marked "not proven" has not been proven BEYOND A REASONABLE DOUBT.

1. The defendant was a principal in the first degree to the murder.

....	....
proven	not proven

2. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

....	....
proven	not proven

(If one or both of the above are marked "proven," complete Section II. If both are marked "not proven," proceed to Section V and enter "Life Imprisonment.")

Section II

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked

"proven" has been proved BEYOND A REASONABLE DOUBT and we unanimously find that each of the aggravating circumstances marked "not proven" has not been proven BEYOND A REASONABLE DOUBT.

1. The victim was a law enforcement officer who was murdered while in the performance of the officer's duties.

.... proven .... not proven

2. The defendant committed the murder at a time when confined in a correctional institution.

.... proven .... not proven

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

.... proven .... not proven

4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

.... proven .... not proven

5. The victim was a child abducted in violation of Code, Article 27, § 2.

.... proven .... not proven

6. The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

.... proven .... not proven

7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

.... proven .... not proven

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

.... proven .... not proven

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

.... proven .... not proven

10. The defendant committed the murder while committing or attempting to commit robbery, arson, rape in the first degree, or sexual offense in the first degree.

.... proven .... not proven

(If one or more of the above are marked "proven," complete III. If all of the above are marked "not proven," do not complete Sections III and IV and proceed to Section V and enter "Life Imprisonment.")

Section III

Based upon the evidence, we make the following determinations as to mitigating circumstances:

1. The defendant has not previously (i) been found guilty of a crime of violence; or (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) been granted probation on stay of entry of judgment pursuant to a charge of a crime of violence.

(As used in the preceding paragraph, "crime of violence" means abduction, arson, escape, kidnapping, mayhem, murder, robbery, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.)

(Mark only one.)

☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(Mark only one.)

☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

3. The defendant acted under substantial duress, domination, or provocation of another person, even though not so substantial as to constitute a complete defense to the prosecution.

(Mark only one.)

☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

(Mark only one.)

☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

5. The defendant was of a youthful age at the time of the crime.

(Mark only one.)

☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

6. The act of the defendant was not the sole proximate cause of the victim's death.

(Mark only one.)

☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(Mark only one.)

☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

8. (a) We unanimously find by a preponderance of the evidence that the following additional mitigating circumstances exist:

.....

.....

.....

.....

(Use reverse side if necessary)

(b) One or more of us, but fewer than all 12, find by a preponderance of the evidence that the following additional mitigating circumstances exist:

.....

.....

.....

.....

(Use reverse side if necessary)

(If the jury unanimously determines in Section III that no mitigating circumstances exist, do not complete Section IV. Proceed to Section V and enter "Death." If the jury or any juror determines that one or more mitigating circumstances

exist, complete Section IV.)

Section IV

Each individual juror shall weigh the aggravating circumstances found unanimously to exist against any mitigating circumstances found unanimously to exist, as well as against any mitigating circumstance found by that individual juror to exist.

We unanimously find that the State has proven by A PREPONDERANCE OF THE EVIDENCE that the aggravating circumstances marked "proven" in Section II outweigh the mitigating circumstances in Section III.

....	....
yes	no

Section V

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:

1. If all of the answers in Section I are marked "not proven," enter "Life imprisonment."

2. If the answer in Section II is marked not "proven," enter "Life Imprisonment."

3. If Section III was completed and the jury unanimously determined that no mitigating circumstance exists, enter "Death."

4. If Section IV was completed and marked "no," enter "Life Imprisonment."

5. If Section IV was completed and marked "yes," enter "Death."

We unanimously determine the sentence to be

.....

Section VI

If "Life Imprisonment" is entered in Section V, answer the following question:

Based upon the evidence, does the jury unanimously determine that the sentence of life imprisonment previously entered shall be without the possibility of parole?

	yes	no
Foreman	....	....
Juror 2	....	....
Juror 3	....	....
Juror 4	....	....
Juror 5	....	....
Juror 6	....	....

or,

.....
JUDGE

(f) Deletions from Form. — Unless the defendant requests otherwise, Section II of the form set forth in section (e) of this Rule shall not include any aggravating circumstance that the State has not specified in the notice required under Code, Article 27, § 412(b) (1) of its intention to seek a sentence of death. Section VI of the form shall not be submitted to the jury unless the State has given the notice required under Code, Article 27, § 412(b) (2) of its intention to seek a sentence of imprisonment for life without the possibility of parole.

(g) Advice of the Judge. — At the time of imposing a sentence, the judge shall advise the defendant that the determination of guilt and the sentence will be reviewed automatically by the Court of Appeals, and that the sentence will be stayed pending that review.

(h) Report of Judge. — After sentence is imposed, the judge promptly shall prepare and send to the parties a report in the following form:

(CAPTION)

REPORT OF TRIAL JUDGE

I. Data Concerning Defendant
   - A. Date of Birth
   - B. Sex
   - C. Race
   - D. Address
   - E. Length of Time in Community
   - F. Reputation in Community
   - G. Family Situation and Background
     1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)
     2. Family history (describe family history including pertinent data about parents and siblings)
   - H. Education
   - I. Work Record
   - J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)
   - K. Military History
   - L. Pertinent Physical or Mental Characteristics or History
   - M. Other Significant Data About Defendant

II. Data Concerning Offense
   - A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)
   - B. Was there any evidence that the defendant was under the influence of alcohol or drugs at the time of the offense? If so describe.
   - C. Did the defendant know the victim prior to the

offense?
Yes ..... No .....
1. If so, describe relationship.
2. Did the prior relationship in any way precipitate the offense? If so, explain.

D. Did the victim's behavior in any way provoke the offense? If so, explain.

E. Data Concerning Victim
1. Name
2. Date of Birth
3. Sex
4. Race
5. Length of time in community
6. Reputation in community

F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:
Not guilty .....; guilty .....; not criminally responsible .....

B. Mode of Trial:
Court ..... Jury .....
If there was a jury trial, did defendant challenge the jury selection or composition? If so, explain.

C. Counsel
1. Name
2. Address
3. Appointed or retained
(If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished.)

D. Pre-Trial Publicity — Did defendant request a mistrial or a change of venue on the basis of publicity? If so, explain. Attach copies of any motions made and exhibits filed.

E. Was defendant charged with other offenses arising out of the same incident? If so, list charges; state whether

they were tried at same proceeding, and give disposition.

IV. Data Concerning Sentencing Proceeding

A. List aggravating circumstance(s) upon which State relied in pre-trial notice.

B. Was the proceeding conducted
before same judge as trial? .....
before same jury? .....
If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so, explain.

C. Counsel — If counsel at sentencing was different from trial counsel, give information requested in III C above.

D. Which aggravating and mitigating circumstances were raised by the evidence?

E. On which aggravating and mitigating circumstances were the jury instructed?

F. Sentence imposed: Life imprisonment
Death
Life imprisonment without the possibility of parole

V. Chronology
Date of Offense
Arrest
Charge
Notification of intention to seek penalty of death
Trial (guilt/innocence) — began and ended
Post-trial Motions Disposed Of
Sentencing Proceeding — began and ended
Sentence Imposed

VI. Recommendation of Trial Court As To Whether Imposition of Sentence of Death is Justified.

VII. A copy of the Findings and Sentencing Determination made in this action is attached to and made a part of

this report.

.....
Judge

CERTIFICATION

I certify that on the ..... day of ....., 19 ..... I sent copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

.....
Judge

Within five days after receipt of the report, the parties may submit to the judge written comments concerning the factual accuracy of the report. The judge promptly shall file with the clerk of the trial court, and in the case of life sentence with the Clerk of the Court of Appeals the report in final form, noting any changes made, together with any comments of the parties.